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CASE NO. 92-1840

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

PATRICIA TORVIK
AND
STEPHANIE TUBBS JONES,

Petitioners,

vs.

MICHAEL G. LEVINE,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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REPLY BRIEF

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REPLY ARGUMENT

I. THE COURT SHOULD NOT BE MISLED BY LEVINE'S ASSERTION THAT THIS CASE ENTAILS A REVIEW OF *FOUCHA v. LOUISIANA*, 504 U.S. ___ , 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992).

Levine would like to have this Court deny the petition for writ of certiorari under the mistaken impression that Petitioners are asking the Court to review its recent decision in *Foucha v. Louisiana*, 504 U.S. ___ , 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). The Court should not be misled. This case has nothing even remotely to do with a reexamination of *Foucha*. Petitioners made that crystal clear in their petition at 10. Ohio fully accepts *Foucha's* two-part test of mental illness and dangerousness as a prerequisite to the commitment of an insanity acquitee. *In re Burton* (1984), 11 Ohio St. 3d 147, 464 N.E.2d 530.

Levine's reformulation of the issue as a review of *Foucha* is a transparent attempt to shift attention away from the real issue — the lower court's disregard of the principles of comity, federalism, and finality that are supposed to guide federal habeas review of state court judgments. The issue here is not whether evidence of mental illness and dangerousness was required to continue Levine's commitment in 1988. The issue, rather, is whether the court below exceeded the bounds of proper habeas review in tossing out the state courts' judgments that Levine was mentally ill and dangerous.

II. LEVINE'S *AD HOMINEM* ATTACK ON THE STATE TRIAL JUDGE IS ANOTHER GROUNDLESS ATTEMPT TO MISDIRECT THE COURT'S ATTENTION FROM THE QUESTION OF THE PROPER SCOPE OF FEDERAL HABEAS CORPUS REVIEW.

Consistent with his attempt to mislead the Court by changing the issues presented by this case, Levine begins his argument with an *ad hominem* attack on the state trial

judge in an effort to distract the Court from the question whether the federal courts here overstepped the bounds of appropriate habeas review. For the first time in the course of these long proceedings Levine impugns the integrity of the state trier of fact.

Never, throughout the course of the state court proceedings, did Levine suggest—as he does now—that the state trial judge was biased as a result of public interest in the case or due to the fact that the judge found Levine NGRI in 1979. At no time did Levine challenge the judge's neutrality based on the judge's having to stand for re-election every six years. Levine did not argue in the district court or in the Sixth Circuit that the judgment of the state trial judge was subject to challenge for the reasons he now advances. Only now, in an attempt to suggest that the court below reached a proper result—even if contrary to principles of federal habeas review—Levine casts aspersions on the state trial judge. Levine's attack on the state trial judge must be seen for what it is—an effort to misdirect the Court from the real issues.

III. THIS CASE PRESENTS AN IDEAL VEHICLE FOR DEFINING THE SCOPE OF FEDERAL HABEAS CORPUS REVIEW.

Levine argues, in his statement of the case, that Petitioners are urging "that testimony from Levine's 1979 trial should override . . . unanimous, unrebutted expert opinions" from the 1988 commitment hearing.[1] Levine deliberately mischaracterizes Petitioners' argument. This Court's own decisions establish the principle that in habeas review of

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[1] Levine misleads the Court by implying that eleven experts testified at the 1988 state court commitment hearing, when in fact only six testified. While Levine characterizes the testimony as "unanimous" and "unrebutted," Judge Angelotta found this testimony not to be credible. The testimony presented in 1988 was substantially the same as that presented in 1983. The magistrate concluded in 1988 that there was sufficient evidence to support the 1983 state court finding that Levine was mentally ill and subject to hospitalization.

the sufficiency of the evidence the state factfinder's role as weigher of the evidence is preserved by requiring federal courts to consider the *entire* state court record in a light most favorable to the State. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).[2]

Here, the court below expressly limited its consideration of the evidence to that newly adduced during the 1988 state court hearing. (A-15). In contrast, the state court judgment was expressly based on the entire record of Levine's mental illness, including, of course, all of the evidence presented at the 1979 trial, as well as all of the evidence presented in all subsequent commitment hearings held in 1979, 1980, 1982, 1983, and 1988. (A- 82). The record of all of the earlier hearings was part of the record of the 1988 hearing. The erroneous analysis of the court below foreclosed the state courts from exercising their proper role as weigher of the evidence by precluding the state courts from weighing 1988 evidence that suggested that Levine was not mentally ill against earlier evidence that established that Levine is incurably mentally ill. Levine posits the test to be what he (or the habeas court) believes a trier of fact should have done with the testimony presented. But the test is not whether a reviewing court subjectively agrees or disagrees with the result reached but whether any rational trier of fact could have reached the result.

To reach the result that it did, the court below broke the bounds of habeas review established in *Jackson.* But this case does not merely present the question of the scope of review of sufficiency of the evidence claims—the question raised in *Wright v. West*, 505 U.S. ___ , 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992). The court below circumvented virtually every principle of federal-state comity to grant Levine relief. The court set aside the presumption of correctness to which

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[2] The irony of Levine's argument is that the district court, which ordered Levine's conditional release based on the 1988 commitment, found the expert testimony from the 1979 trial and earlier commitment hearings sufficient to sustain Levine's 1983 commitment.

the state court finding of mental illness is entitled. It ignored a state appellate court's plain reliance on Levine's procedural default in the trial court. The court below went to the extraordinary length of excusing a procedural default where federal intrusion was unnecessary because of the availability of mandatory periodic commitment proceedings. And the court absolved the district court of the abuse of discretion in supplementing the 1988 state hearing record with new 1992 evidence, which not only had never been fairly presented to the state courts but which the district court placed sole reliance on in its final writ-granting decision.

This case represents a dramatic breach of the principles of federal habeas review. This case calls for review, if not summary reversal.

IV. LEVINE CANNOT SUPPORT THE CONCLUSION THAT A FINDING OF MENTAL ILLNESS IS NOT ENTITLED TO THE PRESUMPTION OF CORRECTNESS.

Levine asserts that the court below need not have given the state court finding of Levine's mental illness the presumption of correctness due state court findings of fact. (Brief in Opposition at 12). But Levine gives only lip service to the Sixth Circuit's conclusion that the question of mental illness is a mixed question of law and fact subject to *de novo* review. Levine himself abandons any pretense that mental illness is a mixed question and argues instead that the presumption of correctness is rebutted here on the ground that the finding of mental illness is "not fairly supported by the record." *See* 28 U.S.C. 2254(d)(8).

Levine is wise to abandon the Sixth Circuit's faulty conclusion that a finding of mental illness is not entitled to the presumption of correctness. That court's conclusion was reached without reference to this Court's clear contrary pronouncements in *Maggio v. Fulford*, 462 U.S. 111 (1983), and *Miller v. Fenton*, 474 U.S. 104, 113 (1985), as well as in the Court's cases dealing with the commitment of the mentally ill. Levine himself recognizes that the record

contains substantial expert testimony that Levine is incurably mentally ill. The state court judgment *is* fairly supported by the record.[3]

V. LEVINE CANNOT OVERCOME THE PROCEDURAL BAR TO FEDERAL HABEAS CORPUS REVIEW OF HIS CLAIM.

Levine continues to argue that he did not procedurally default his constitutional claim of insufficient evidence despite the acknowledged fact that the 1988 state trial court record contains no challenge whatsoever on federal constitutional grounds. Levine did not "fairly present" his claim, as required by *Anderson v. Harless*, 459 U.S. 4 (1982), on the record of the trial court proceedings. Rather, he suggests that it was sufficient for him to present his claim *outside the record* by means of providing the judge with a courtesy copy of the federal magistrate's March 30, 1988 decision, which was subsequently vacated by the Sixth Circuit on May 24, 1988. Not even the court below bought this argument.[4]

Levine concedes that the Ohio court of appeals' plain

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[3] Levine repeats the erroneous assertion that Ohio supports a presumption that he can never be released. The only claim Ohio makes is that on the present record the trier of fact was entitled to reach the decision it did. Whether another trier of fact in another, subsequent hearing would reach the same result should be left to the next commitment hearing.

[4] Levine again misleads the Court. The decision provided to Judge Angelotta was the decision in which the magistrate concluded that "there was sufficient evidence before the Common Pleas Court in December, 1983, to permit a rational trier of fact to conclude, to a clear and convincing degree, that Michael Levine was then a mentally ill person subject to hospitalization by court order." Levine argues that the judge should have assumed that Levine was raising constitutional claims with respect to his 1988 commitment based on claims rejected by the federal court with respect to his 1983 commitment. In fact, at the 1988 commitment hearing Levine acknowledged to Judge Angelotta that the vacated magistrate's decision was "null and void."

statement that he failed to raise his constitutional claim in the trial court is "very similar" to the Florida Supreme Court's reliance on procedural default in *Sochor v. Florida*, 504 U.S. ___ , 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992). (Brief in Opposition at 15 n.13). In *Sochor* this Court found the Florida court's reliance to be more than adequate to preclude the exercise of federal habeas jurisdiction. Levine is unable to find a basis on which to distinguish *Sochor*. The court below failed to discuss *Sochor* at all.

Nevertheless, Levine contends that he can meet the cause and prejudice test and thereby overcome the default. Suffice it to say that the court below found no merit in this contention because it moved on to consider excusing the procedural default under an "actual sanity" exception. (A-18).

Levine argues that federal intrusion is justified by the fact that he has so far been unsuccessful in obtaining relief in state court. This argument is circular. Federal intervention is warranted only where state courts, fairly presented with the federal constitutional claim, fail to apply existing constitutional standards. *Teague v. Lane*, 489 U.S. 288, 298-9 (1989). Levine did not fairly present his constitutional claim in the 1988 proceedings. He may still do so in the next state court commitment proceedings. The grant of habeas corpus relief here does not serve the fundamental purpose of federal review, which is to ensure that state courts faithfully apply constitutional standards.

CONCLUSION

Petitioners again ask the Court to grant a writ of certiorari. Alternatively, Petitioners ask the Court to summarily reverse the decision of the Sixth Circuit Court of Appeals and to remit Levine to his state court periodic review remedies.

Respectfully submitted,

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